

## REFORM OF PRIVACY

### *Introduction*

The doctrine of privacy as laid down by the courts in the 19th century has long been the target of law reformers. As long ago as 1937 the United Kingdom Law Revision Committee suggested statutory modification of the privacy rules, and the failure of successive governments to give effect to that recommendation has drawn vigorous comment from the House of Lords in recent leading cases. Statutory modification has been achieved in Israel and in two Australian states. Now the question of reform has arisen in New Zealand with the Report on Privacy of Contract presented to the Attorney-General by the Contracts and Commercial Law Reform Committee in May of this year. The Report is a very full one, though some of the material in it does not seem to have been entirely necessary for the draft Bill proposed. However, it is heartening to see that the Committee is giving thought to the application of contractual reforms in other areas of law.

### *The proposed reforms*

The doctrine of privacy is generally treated as having two "limbs" or "aspects". The "burden" aspect provides that no contract can impose a binding obligation on a person who is not a party to the contract creating that obligation. The "benefit" aspect provides that no person can enforce a contractual provision conferring a benefit upon him unless he is a party to that contract. The Report focusses almost entirely on the latter aspect of the privacy rule, and indeed the proposed Bill would hardly affect the burden aspect at all.

The principal element in the proposed reform is contained in clauses 4 and 8 of the Committee's draft Bill.

Clause 4 provides "Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person who is not a party to the deed or contract (whether or not the person is identified or in existence at the time when the deed or contract is made) the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise.

Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create an obligation enforceable at the suit of that person."

Clause 8 provides that the obligation imposed by clause 4 on such a promisor can be enforced by the person to whom the benefit was promised as if he were a party to the contract, and he may seek any of the remedies which he could have sought if he had been a party to the contract or deed. There are, however, some limitations on the right to enforce. Clause 9 provides that where the beneficiary sues to enforce a promise, the promisor may raise any defences which would have been open to him if the beneficiary had been a party to the contract, or would have been open to him if the action had been brought by the promisee. However, set-offs or counter-claims which could be pleaded against the promisee may only be pleaded against the beneficiary where the set-off or counter-claim pleaded arises from the deed or contract conferring the benefit on the beneficiary. Further, the beneficiary is only liable on such a counter-claim where he has continued with his action with full knowledge of the counter-claim.

The draft Bill also makes provision affecting variation and discharge of the deed or agreement. The contract may be varied or discharged with the consent of the parties and the beneficiary at any time, or by the promisor and promisee if the agreement contained, to the knowledge of the beneficiary, a provision for variation or discharge and the variation or discharge is in accordance with that provision. However, where the beneficiary does not consent to changes in the arrangement and is not required by a term of the agreement to accept them, the contract may only be varied or discharged within the limits set by the Bill. The primary one of these is in clause 5, which provides that the agreement can only be varied or discharged if the beneficiary or any other person has not altered his position in reliance on the promise for the benefit of the beneficiary or the beneficiary has not taken steps to enforce the benefit. If variation or discharge has been or may be barred by clause 5, a court order for variation or discharge may be sought under clause 7, on such conditions as the Court thinks fit, provided that it shall order compensation, of such amount as it thinks fit, be paid to the beneficiary where the beneficiary has been "injuriously affected" by reliance of himself or any other person on the promised benefit.

### *Comment*

The success or otherwise of this proposed reform will be decided largely by the approach taken to one crucial provision, but there are other areas of the draft Bill which may cause some concern. The critical provision is the proviso to clause 4, which provides that promises for the benefit of third parties are not enforceable if "on the proper construction" of the agreement, the agreement was not intended to create an obligation enforceable at the suit of the beneficiary. This supposes that such an intention can readily be spelled out. In the recent English case of *Woodar Investment Development Ltd v Wimpey Construction Ltd* [1980] 1 All ER 571, the appellant was selling land to the respondent. The price to be paid to the appellant was £850,000 and there was also a covenant that "Upon completion of the purchase of the whole or any part of the land the purchaser shall pay to Transworld Trade Ltd of 25 Jermyn Street, London, S.W.1 the sum of £150,000." Transworld were not connected by ties of agency or trust with the vendor. The Law Reform Committee Report (paragraphs 6.3 and 6.4) clearly is of the opinion that in this case Transworld should have been able to sue, and that the draft Bill would allow them to do so. Yet one must ask whether the covenant quoted can be construed as being intended to give the third party a right to enforce. In contracts between lay people it may be even more difficult to tell whether the parties intended the beneficiary to have rights to enforce. In the leading Australian case of *Coulls v Bagot's Executor and Trustee Coy* (1967) 40 ALJR 471, the husband had granted rights to a quarrying company to remove stone from his land. The agreement, clearly drawn up without legal assistance, recited the licences he was giving and the royalty payments, and concluded "... I authorise the above Company to pay all money connected with this agreement to my wife . . . and myself . . . as joint tenants (or tenants in common) (the one which goes to the living partner)". The agreement was signed by the husband, the wife and a representative of the company. There would appear

to have been a clear intention on the husband's behalf to confer a benefit on his wife—the right to receive royalty payments if he should die during the term of the contract—but it must be questioned whether the contract shows a clear intention to entitle the wife to take action to enforce that benefit.

Since the courts have never had to consider before whether a third party was intended to have a right to enforce, none of the normal rules of interpretation of a contract will be of much assistance. One analogy which may be drawn is with the approach to whether or not an agreement was intended to create legal relations between the parties. The cases here show that in commercial agreements there is a presumption in favour of the agreement being legally binding, whereas in "domestic" agreements (those made between family members or on social occasions) there is a presumption against legal relations. As far as commercial agreements are concerned, the analogy may well suit the proposed Bill. The Report (para 8.2.1) suggests that there are certain contracts such as those for bulk supplies of electricity or water where it might be undesirable that the beneficiaries themselves can enforce the contract. But if there is merely a presumption that commercial agreements give rise to enforceable rights, the nature of the contract and of its subject matter, as well as factors of public policy, would give scope for the courts to hold that such agreements were only enforceable by the parties themselves. In other cases, it is submitted, it should be for businessmen to exclude clearly a right of a third party to enforce the benefit the parties have agreed to confer.

Different considerations may apply with regard to "domestic" agreements. If there is any presumption against beneficiaries being able to enforce such arrangements, then the beneficiary must not only show that the agreement was intended to be legally binding, but also that he or she was intended to be able to enforce it. It might be supposed that in many such cases, the parties may not have been aware that the beneficiary's right to sue was not automatic, and therefore will not have provided expressly for it. Yet as many of the privity cases reported are concerned with agreements between relatives, there may be a substantial number of cases which this Bill ought to cover clearly.

If, as is submitted, neither the current rules of construction nor the analogy with the intention to create legal relations cases will give the Courts much assistance in determining whether the beneficiary was intended to sue, one must suggest that a clearer provision be made in any reform Bill.

It is submitted that the position can be alleviated by the inclusion of a presumption that in all cases the beneficiary is intended to be able to enforce, but that the presumption should be rebuttable by evidence that the nature of the agreement or its subject matter or the relationship of the parties is such the beneficiary should not be able to enforce. This, it is suggested, would allow the aim of privity reform—that of giving beneficiaries a right to enforce the promises made for their benefit—to be achieved in the majority of cases, but still give scope to deal with the exceptional cases envisaged by the report.

The effect of the reform will largely be determined by the availability of the right to enforce, but there are three other matters which are also worthy

of note. In each case, they relate to the relationship of the draft Bill with other areas of law.

The first, and the simplest, is to note that the draft Bill would repeal s. 7 of the Property Law Act 1952 thus placing beneficiaries under a deed in the same position as beneficiaries under a contract. This would also obviate the problems of interpretation of the section evident in *Armstrong v Public Trustee* [1953] NZLR 1042 and *Re Wilson's Settlements* [1972] NZLR 13. The change would appear to be for the better. However, the relationship with the law of trusts is not, perhaps, comfortable. The draft Bill (clause 14(e)) states that the reform would not in any way affect the law of trusts. Yet there are contracts, which do create trusts (as in *Re Garbett* [1963] NZLR 384), and such contracts will fall within the wording of clause 4 of the draft Bill. If clause 14(e) is to be given full effect, such contracts are not covered by the draft Bill. Insofar as the beneficiary under such agreements has right in equity to enforce the benefit, there is no need for the rights created by the Bill. Yet there may be cases where it is of importance to know whether such contracts are covered by the Bill or not. The settlor of a trust has a general right to have the trust set aside if the settlement was made under mistake or through fraud. Yet if a trust created by contract can thus be set aside, there is a contract which confers a benefit on a third party which can be set aside without reference to the Bill. The provisions of the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979 might also affect such contracts. It would be desirable for a reform bill to deal more clearly with such problems.

The second matter is more curious. The Report (para 4.2), considers briefly the position of contracts for the benefit of companies not yet formed, notes that reform may be desirable, but concludes that such reform is outside the scope of this Bill. Yet it appears that on the wording proposed, there may be occasions where a company may be able to enforce a pre-incorporation contract. Where the promoters of a company not yet incorporated contract in their own names, but stipulating that a benefit will be given to the company on formation (e.g. the transfer of property to the company), then there is a valid contract for the benefit of a beneficiary not yet in existence. The nature of the transaction, or suitable wording in the contract, may make it clear that the company is to have a right to enforce the benefit, and the rights of the person contracting with the promoters would be protected by the availability of defences and counter-claims as set out in clause 9 of the Bill. It is difficult to see how a wide enough reform of privity can be carried out without allowing some such infringement of the company law rules so that if the Bill is not intended to affect them, this should be explicitly stated.

The third matter concerns the relationship of the Contractual Remedies Act 1979 and the proposed Bill. Under the draft Bill, a promisor may not resile from his promise to the beneficiary if the beneficiary or any other person has altered his position materially in reliance on the promise, (clause 5(1)(c)) or has taken steps to enforce it unless the beneficiary agrees, or there is provision in the agreement for the discharge of the contract without the consent of the beneficiary and such provision is known to the beneficiary. Where the discharge is or may be precluded by clause 5(1)(a), an order of the court authorising discharge, with or

without conditions, may be sought. This procedure would appear to mean that even where the initial contract is defeasible (as when it was entered into on the basis of misrepresentations by the promisee), the promisor must seek an order for discharge rather than exercise his remedies under the Contractual Remedies Act (which, in the misrepresentation example, might entitle the promisor to cancel the contract and be excused from further performance). There may be times when the seeking of an order for discharge is not immediately practical—it might then be more prudent for the promisor to commit a deliberate breach of contract and rely on the vitiating factor as a defence available under clause 9(2)(b) of the Bill than to rely on the Contractual Remedies Act. While it is hard to conceive of an instance where the promisor would be seriously prejudiced, it is perhaps unfortunate that this reform is not better integrated with its predecessor.

### *Conclusion*

Although several criticisms of the draft Bill have been advanced, the approach taken by the Committee is one that should be capable of giving rise to a clear, and long overdue, reform of the rules in this area of the law.

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## *THE DUNEDIN COMMUNITY LAW CENTRE — A MATRIX FOR REFORM?*

Although the Dunedin Community Law Centre caused a few raised eyebrows in its idea stage, the end product settled unobtrusively into the legal landscape. To this extent, the enterprise reflects an ambience with current thinking and represents little out of the ordinary. However, it can also be said that the presence of the Law Centre is generating gentle tremors that are being felt outside the locus of its immediate activity. Here one finds the Law Centre in the enviable position of having wide appeal without sacrifice to its original ideals in the process. This note will look at this phenomenon in terms of the Law Centre's operation, its setting, and its influence, respectively.

### *Operation*

The Dunedin Community Law Centre came into existence in June of 1980. Unlike other innovations in legal services, the initiative came from outside the profession. The Law Centre is a charitable trust founded and operated by law students at the University of Otago. The core of its operation is a legal advice and referral service located in a storefront premises near the university. The service is open to the public four evenings a week and is staffed by senior law students under the supervision of